

CENTRAL OHIO COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 92-73

Decided July 31, 1997

Appeal from a decision of Administrative Law Judge David Torbett dismissing an application for review of a notice of violation. CH 89-2-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Under 30 C.F.R. § 843.12(a)(2), a properly and lawfully promulgated regulation of the Department, OSM's oversight capacity includes the authority to issue a notice of violation in individual cases although the primary regulatory responsibility for enforcement of surface coal mining and reclamation operations has been assumed by the state under the provisions of SMCRA. Duly promulgated regulations have the force and effect of law and this Board may not treat them as insignificant or otherwise declare them invalid.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

When, in response to a 10-day notice, the state agency refuses to take corrective action because it does not consider a violation of the state program to exist, it is proper for OSM to construe the state's response as inappropriate and proceed with a Federal inspection where the interpretation advanced by the state agency is contrary to both the intent of SMCRA and a reasonable interpretation of state law.

3. Rules of Practice: Appeals: Jurisdiction--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

The Secretary has delegated authority to the Board of Land Appeals to decide finally for the Department

appeals relating to the conduct of surface coal mining under the SMCRA.

APPEARANCES: D. Michael Miller, Esq., and Charles H. Cooper, Jr., Esq., Columbus, Ohio, for Central Ohio Coal Company; Wayne A Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Central Ohio Coal Company (Central Ohio) appeals from a September 13, 1991, Decision by Administrative Law Judge David Torbett sustaining Notice of Violation (NOV) No. 89-07-254-01 issued by the Office of Surface Mining Reclamation and Enforcement (OSM), and dismissing Central Ohio's Application for Review. This proceeding concerns Central Ohio's Olive Green Mine in Noble County, Ohio, operated under Ohio Permit No. D-0127.

The NOV in question was issued by OSM on March 22, 1989, for failure to properly treat or cover toxic-forming materials on a reclaimed minesite in violation of Ohio Administrative Code §§ 1501:13-9-14(J), 13-9-04(J), and 13-05-01(F), and Departmental regulations 30 C.F.R. §§ 816.102(f) and 816.41(f).

The Application for Review was filed by Central Ohio on April 24, 1989, and scheduled for hearing on May 25, 1989. In lieu of a hearing, the parties thereafter filed a stipulation of facts and exhibits, and responsive briefs, upon which Judge Torbett rendered his Decision. Judge Torbett summarized the evidence as follows:

On January 19, 1989, OSMRE Inspector Richard W. Buckley, accompanied by two inspectors of the Ohio Department of Natural Resources (hereinafter "ODNR"), conducted a random inspection of Central Ohio Permit No. D-0127. This inspection revealed several areas barren of vegetation. Two soil samples were taken -- one from another area and a second from the barren area. Laboratory analysis determined the first sample to be non-toxic while the second held toxic forming materials. (Stipulation No. 5). Based on the analysis, the toxic concentration of the second sample met the definition of "toxic forming materials" under the applicable Ohio reclamation rules. (Stipulation No. 7.)

Inspector Buckley issued ODNR a Ten-Day-Notice [TDN] No. 89-07-254-02 under § 521(a)(1) of the Act, codified at 30 U.S.C. 1271(a)(1), to ODNR, notifying the state authority that Central Ohio had failed to properly treat or cover the toxic forming materials. ODNR's response to the Ten-Day-Notice stated that the department had determined there to be no violation of Ohio's reclamation laws. (Exhibit 5.) ODNR responded

that because the state revegetation standards had been met in the areas in question, that the standards requiring covering or treating of the toxic forming materials need not be separately applied. (Exhibit 5.) According to ODNr, the amount of toxic forming materials present was insufficient to prevent the intended post-mining land use as measured by the revegetation standards. On March 1, 1989, OSMRE advised ODNr that its response was considered inappropriate. (Exhibit 6.) Nina Rose Hatfield, the Columbus Field Office Director, informed Tim Dieringer, Chief of ODNr, that ODNr's interpretation rejecting the standard to treat exposed toxins as a separate requirement apart from the vegetation standards was arbitrary and capricious. (Exhibit 6.) ODNr did not seek informal review of OSMRE's determination as permitted by the regulations at 30 C.F.R. § 842.

OSMRE conducted a follow-up inspection under its oversight authority on March 22, 1989. Inclement weather had prevented any action to eliminate the toxins. Three barren areas were inspected, measuring 918 square feet, 1,620 square feet and 2,961 square feet, respectively. (Stipulation No. 15.) On the same day, Notice of Violation No. 89-07-254-01 was issued for failure to properly cover or treat the toxic forming materials.

The pH level measures solubility of trace elements available to plants. These trace elements can be toxic to plants when they are more soluble, as they become more so under more acidic, or lower pH [sic] levels. The optimum soil pH for most plants is 6.5 with the lower limit at 4.0. Few plants can survive a pH lower than 4.0. No tests were made of the Central Ohio site to determine the level of any soluble trace elements. (Stipulation No. 18.)

OSMRE determined that the pH of the soil in the barren areas is too acidic to support plant growth. (Stipulation No. 19.) Based on the potential acidity, 33.1 tons per acre of pure agricultural lime would have to be added to offset the additional acid which would be generated if all the pyrites present in the soil reacted. (Stipulation No. 23.) Either burying the acidic soil beneath the root zone of the vegetation or treating the areas with agricultural lime would remedy the violation. (Stipulation No. 25.)

(Decision at 2-3.) After presenting the foregoing, Judge Torbett summarized the controversy as follows:

The essential issue in this case is whether Respondent had authority to issue the NOV against Applicant, Central Ohio, under its federal oversight authority of an approved state program in a primacy state. The application for review and the subsequent

briefs have raised three preliminary questions to answering the ultimate issue as to the validity of the NOV which are:

- (1) Whether § 1271(a)(1) of the Act authorizes OSMRE to issue NOV's against individual operators in primacy states for violations discovered during federal oversight inspections.
- (2) Whether the implementing regulation, 30 C.F.R. 843.12(a)(2), legitimately authorizes OSMRE to issue NOV's under § 1271(a)(1) of the Act.
- (3) Whether ODNR's response to the Ten-Day-Notice based on its assessment that there was no violation of Ohio law was inappropriate or lacked good cause so that Respondent had authority to reinspect Applicant's operations.

(Decision at 3.) With respect to the first two questions, Judge Torbett concluded in his Decision that "the Secretary has bound this tribunal to interpreting § 1271(a)(1) as authorizing OSMRE to issue NOV's under its federal oversight authority" and "[i]t is now well settled that * * * OSMRE is authorized to issue an NOV under 30 U.S.C. § 1271(a) (1982) and 30 C.F.R. § 843.12(a)(2) when a state fails to take appropriate action in response to a 10-day notice." (Decision at 6, 9.) After explaining that a challenge to OSM's jurisdiction to issue the NOV is proper if based on whether ODNR's response to the TDN was inappropriate or lacked good cause, Judge Torbett reviewed the State law purportedly violated and ODNR's response. He concluded that Central Ohio's "failure to treat or cover the admittedly toxic forming materials violated Ohio law, regardless of the revegetation measures taken" and that "ODNR's subsequent refusal to pursue any enforcement action was based on an arbitrary and capricious interpretation of Ohio's program standards, and as such, lacked good cause." (Decision at 12.) Citing Central Ohio's failure "to overcome [OSM]'s proof that ODNR's interpretation of Ohio law was incorrect and that [OSM] had both statutory and regulatory authority to issue the NOV," Judge Torbett sustained NOV No. 89-07-254-01 and dismissed Central Ohio's application for review. (Decision at 13.) Central Ohio appealed.

Central Ohio, in its statement of reasons (SOR), continues with the issues and debate it initiated before Judge Torbett. Appellant argues that Judge Torbett erred in his conclusions that 30 U.S.C. § 1271(a)(1) (1994) and 30 C.F.R. § 843.12(a)(2) properly authorize OSM to issue the subject NOV in a primacy state and that ODNR's response to the TDN was inappropriate or lacked good cause. Appellant also asserts that this Board is without jurisdiction to review Judge Torbett's Decision.

The OSM responds that Judge Torbett was bound by the Secretary's interpretation of the agency's authority and the Department's regulations. The OSM asserts that proper implementation of the surface mining laws and

regulations required it to issue the subject NOV as a surface mining violation existed. The OSM contends that Judge Torbett was correct in ruling that ODNR's refusal to enforce the law was arbitrary and capricious because the "either/or" approach was clearly contrary to Ohio law.

[1] The first part of Central Ohio's appeal rests on the notion that OSM lacks authority to take enforcement action concerning individual violations alleged to exist in a primacy state. Specifically, Central Ohio contends that the statute cited by OSM, section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1994), does not expressly or implicitly grant such authority to OSM. To hold that it does grant such authority, Appellant argues, renders subsections (a)(2) and (a)(3) of section 521, 30 U.S.C. §§ 1271(a)(2), (a)(3) (1994), meaningless.

When a state program is approved, the state assumes responsibility for issuing mining permits and enforcing its regulatory program. In Re Surface Mining Regulation Litigation, 627 F.2d 514, 519 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981); In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). Section 503(a) of SMCRA, 30 U.S.C. § 1253(a) (1994), authorizes the Secretary to grant a state exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands, "except as provided in section 521." Section 504(b) of SMCRA, 30 U.S.C. § 1254(b) (1994), provides for "Federal enforcement, under the provisions of section 521 of this title, of that part of a State program not being enforced by the State." Both the plain language of SMCRA and its legislative history clearly indicate that OSM has jurisdiction to enforce any part of a state's program not being enforced by that state. Annaco v. OSM, 119 IBLA 158, 162 (1991).

There is no question regarding OSM's authority to issue the TDN. This action was taken pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994), which provides that, in a state with primacy, OSM cannot take enforcement action when it discovers an apparent violation until it notifies the state and gives the state 10 days in which to take appropriate action to cause the violation to be corrected or to show good cause for failure to do so. Based upon evidence of uncovered toxic-forming materials in existence within the surface mining area, OSM issued the TDN to ODNR. In response to this notice, ODNR advised OSM that it was taking no action on the alleged violation. Section 521(a)(1) provides that if

the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *.

After determining that ODNR's response to the TDN did not show good cause for failure to take action, OSM reinspected the reclamation site.

It is OSM's reinspection and actions thereafter, especially the NOV issued pursuant to 30 C.F.R. § 843.12(a)(2), which Central Ohio asserts is beyond OSM's authority under SMCRA. However, it has been the position of this Board that while a primacy state has primary jurisdiction for enforcement of an approved state program, that jurisdiction is not exclusive, and OSM has the authority to enforce the state program on a mine-by-mine basis under proper circumstances. See, e.g., Consolidation Coal Co. v. OSM, 127 IBLA 192 (1993); W.E. Carter, 116 IBLA 262, 266-67 (1990); Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989). Such enforcement includes issuance of an NOV when the state regulatory authority's response to a TDN is deemed inappropriate. Id.

The legislative history of this Act supports that conclusion. Congress apparently anticipated that the Secretary would need to take enforcement action, short of taking over all or part of a state program, to guarantee compliance with SMCRA. As the final Senate report on SMCRA stated:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal back-up to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong. 1st Sess. 88 (1977); H.R. Rep. No. 896, 94th Cong. 2d Sess. 119 (1976). See also Turner Brothers, Inc. v. OSM, 92 IBLA 320, 324-25 (1986). Similarly, this report explained with respect to section 404(b) of the pending legislation (section 504(b) in the final version of SMCRA) "The Committee fully intends that under subsection 404(b) the Secretary will use the enforcement authority granted him under subsections 421(a)(1) through (4) [sections 521(a)(1) through (4) in the final version of the Act], if a State with an approved program fails to enforce against an operator who is violating the Act." S. Rep. No. 128, 95th Cong. 1st Sess. 72 (1977). This reference to a single operator supports OSM's position that in a state with an approved program, enforcement by OSM may be on a mine-by-mine basis rather than requiring the Secretary to first take over all or part of the state program.

The regulation at issue, 30 C.F.R. § 843.12(a)(2), reads as follows:

When on the basis of any Federal inspection other than the one described in paragraph (a)(1) of this section [Federal lands program, Federal program, or Federal enforcement of State program under section 521(b)], an authorized representative of the Secretary determines that there exists a violation of the

Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action to cause the violation to be corrected, or to show good cause for such failure, subject to the procedures of § 842.11(b)(1)(iii) of this chapter, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before the issuance of a notice of violation if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter.

Central Ohio asserts that the authority given to OSM through this regulation exceeds the scope of SMCRA as the scheme defined by the regulation has no basis in section 521.

Appellant argues that the enforcement authority of OSM is clearly explained in the statute. Appellant concedes that OSM has the right under subsection (a)(2) to issue cessation orders (CO's) when, during a Federal inspection, it learns that a violation or condition exists that threatens imminent and substantial harm and that OSM has the right to issue NOV's under subsection (a)(3) when, during an inspection where OSM is the primary enforcement authority, it discovers a violation which is not threatening imminent harm. Appellant also acknowledges that OSM may issue CO's and NOV's under section 521(b), but only after it has initiated proceedings to revoke that state's primacy status. Appellant, however, contends that authority to issue an NOV or CO is not contemplated in section 521(a)(1). If, after the mandatory inspection, OSM discovers an "imminent danger" condition, it may issue a CO, but only under the authority found in section 521(a)(2). Otherwise, enforcement remains with the State regulatory authority, according to Appellant. Thus, Appellant contends, 30 C.F.R. § 843.12(a)(1) has no statutory foundation and any action thereunder should not have been upheld by Judge Torbett.

Judge Torbett's review of this matter was based on the Department's Statement of Policy published in the Federal Register on March 3, 1983: "Upon examination of the issue, the Department has concluded that the regulation contained at 30 C.F.R. 843.12(a)(2) was properly and lawfully promulgated; therefore, there is no need to reconsider the issue." 48 Fed. Reg. 9199 (Mar. 3, 1983). 1/

1/ The OSM was presented with a petition for rulemaking on May 30, 1986, requesting in part that OSM repeal its existing regulations authorizing the issuance of Federal NOV's in primacy states. 51 Fed. Reg. 27197 (July 30, 1986). The Director, OSM, denied that part of the petition, reaffirming the Department's position that § 843.12(a)(12) was properly promulgated.

In support of its view that the regulation is in excess of the Department's power, Central Ohio cited several district court cases to Judge Torbett. Judge Torbett reviewed those cases in his Decision and determined that the court in each case held that it was without jurisdiction to entertain a challenge to the regulation. (Decision at 7-8.) 2/

Judge Torbett then referenced the following Board decisions sustaining OSM's authority to issue an NOV under section 843.12(a)(2) when a state fails to take appropriate action in response to a TDN: Donaldson Creek Mining Co. v. OSM, 111 IBLA 289 (1989); Mario L. Marcon, 109 IBLA 213 (1989); Willowbrook Mining Co. v. OSM, 108 IBLA 303 (1989); Alabama By-Products Corp., Drummond Coal Co. v. OSM, 103 IBLA 264 (1988); Peabody Coal Co. v. OSM, 95 IBLA 204, 94 Interior Dec. 12 (1987); Bannock Coal Co. v. OSM, 93 IBLA 225 (1986); Turner Brothers v. OSM, 92 IBLA 320, 93 Interior Dec. 199 (1986); Shamrock Coal Co. v. OSM, 81 IBLA 374 (1984). On judicial review, the respective district courts in Turner Brothers v. OSM, Civ. No. 86-380-C, slip op. at 3 (E.D. Okla. Oct. 5, 1987), and Willowbrook Mining Co. v. Lujan, Civ. No. 89-1223, slip op. at 7 (W.D. Pa. Jan. 19, 1993), while affirming the Department's action, declined to review the Department's authority to issue NOV's under the subject regulation because such challenges to rulemaking under SMCRA must be brought in the U.S. District Court for the District of Columbia pursuant to 30 U.S.C. § 1276(a)(1) (1994). 3/ No successful challenge to OSM's authority to issue an NOV pursuant to section 843.12(a)(2) has been decided by the U.S. District Court for the District of Columbia.

Accordingly, we find no merit in Central Ohio's challenge to Judge Torbett's treatment of this particular issue. Nothing in Appellant's arguments suggests that this Board should now disregard its position of sustaining OSM's authority to issue NOV's pursuant to 30 C.F.R.

fn. 1 (continued)

52 Fed. Reg. 21598 (June 8, 1987). An informative discussion on the background to the petition and an analysis of the regulations was provided as an appendix to the published notice of the Director's decision. Id. at 21599-602.

2/ In an action for an injunction to enjoin the Secretary from enforcing a NOV issued by OSM, the district court in Clinchfield Coal Co. v. Hodel, 640 F. Supp. 334 (W.D. Va. 1985), found that § 843.12(a)(2) exceeded the Secretary's statutory authority, the position taken by Appellant. On appeal, the U.S. Court of Appeals for the fourth Circuit reversed in Clinchfield Coal Co. v. Department of the Interior, 802 F.2d 102 (1986), on the grounds that the district court lacked jurisdiction to consider the temporary injunction where such review involved consideration of the validity of § 843.12(a)(2).

3/ In Donaldson Creek Mining Co. v. OSM, Civ. No. C-89-0314-P (W.D. Ky. July 18, 1991), the court affirmed the IBLA decision without addressing this issue. The action brought in Shamrock Coal Co. v. OSM, Civ. No. 84-238 (E.D. Ky. May 13, 1987), was dismissed without prejudice because the violation had been abated.

§ 843.12(a)(2). Duly promulgated regulations have the force and effect of law and, thus, this Board has no authority to treat as insignificant or declare invalid such duly promulgated regulations. Alpine Construction Co. v. OSM, 114 IBLA 232, 238 (1990); Shamrock Coal v. OSM, 81 IBLA at 377; see also ANR Production Co., 118 IBLA 338 (1991); Wilfred Plomis, 34 IBLA 222 (1978). As the Board clearly explained in Consolidation Coal Co. v. OSM, 127 IBLA at 194:

Consol also argues that a challenge to Departmental regulation 30 CFR 843.12(a)(2) may properly be raised now, before this Board, as an issue on appeal. This argument, too, has previously been rejected by the courts and this Board: exclusive jurisdiction over challenges to regulations promulgated to implement SMCRA rests with the United States District Court for the District of Columbia. * * * This Board is therefore not the proper forum for such a regulatory challenge; nor it is a likely place to question the validity of a rule that we have regularly applied to require enforcement action of the sort taken by OSM in this case.

[2] The application of section 521(a) and 30 C.F.R. § 843.12(a)(2) is implemented under Departmental regulation 30 C.F.R. § 842.11(b)(1), as follows:

An authorized representative of the Secretary shall immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this chapter, the applicable program, or any condition of a permit or exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health and safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources and--

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program * * *; or

(B)(1) The authorized representative has notified the State regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall

determine in writing whether the standards for appropriate action or good cause for such failure have been met * * *;

(2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.

(3) Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.

(4) Good cause includes: (i) Under the State program, the possible violation does not exist; (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist; (iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation; (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) of the Act have been met; or (v) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

(Emphasis supplied.) The requirement for action is dependent upon the facts of the particular case.

As noted, OSM notified ODNR by TDN that "Operator [Permit D-0127] has failed to properly cover or treat toxic forming materials on mine year 3 in the watershed of P-005," (TDN X-89-07-254-02 TV01). The ODNR responded on March 21, 1989, as follows:

The Division did not address the potential toxicity of mine year 3 when it considered the soil sample data submitted with the phase II bond release request. There was no parameter of the analysis which indicated that meeting the revegetation requirements would be a problem. At the time of the bond release inspection, the Division measured total barren area on year 3 as being well within allowable tolerances as there was not more than 1,400 square feet in existence. Since the requirements of the revegetation rule were met, the Division can not see the validity in attempting to apply OAC 1501:13-9-14(J)(1) to the same area again as some separate and absolute performance standard unto

itself. The responsibility to cover or otherwise treat toxic-acid forming materials has been met in that they are not present in sufficient quantities or locations so as to preclude the attainment of the future intended land use.

There is no water monitoring data provided by OSM which reflects an unacceptable disturbance to the quality of surface or groundwater in the permit or adjacent area in contradiction to ORC 1513.16(A)(10) or (14).

There is no data in this TDN or the previous one that shows that the requirements of ORC 1513.16(A)(2),(3) " * * * and to cover all acid forming and other toxic materials in order to achieve an ecologically sound land use * * * or (18).

No violation exists and no enforcement action is proposed.

(Ex. 5 to Stipulations.)

The OSM advised ODNR:

The Division's response is considered to be inappropriate for the following reasons.

The response indicates that the size of areas with exposed toxics to be treated is defined by the barren area criteria in the revegetation success standards (OAC 1501: 13-09-15(E)) once vegetation has been established. This, in essence allows that one percent of the reclaimed area (with no single area being greater than 3,000 square feet) can be left with exposed toxics.

This represents a waiver or exemption from the program requirement to treat exposed toxics (OAC 1501: 13-9-14(J)(1) and is not supported in the Division's response; nor, can such an exemption be found in the approved State program.

The indication that water monitoring data needs to reflect an unacceptable disturbance to the quality of surface and or ground water before an area of exposed toxics needs to be covered also cannot be found in the approved program. The standard to cover exposed toxics is a separate and independent standard that is applicable to surface coal mining and reclamation operations throughout their existence.

The Division's response indicating that the requirement to cover exposed toxics is only applicable when other performance standards are not complied with is considered to be an arbitrary and capricious interpretation of the Ohio program.

(Ex. 6 to Stipulations.)

The ODNR did not seek an informal review of OSM's determination pursuant to 30 C.F.R. § 842.11(b)(1)(iii)(A). However, Central Ohio applied for a review of the NOV issued on March 22, 1989. In its request, Central Ohio asserted that the NOV was "based upon an arbitrary and capricious interpretation of Ohio's permanent regulatory program and its application" and that the NOV "interprets and applies the laws of the State of Ohio in relation to subjects regulated by the State but in a manner different from and inconsistent with the State of Ohio's interpretation and application of its regulations." (Application for Review at 2, 3.)

The merit of this appeal, therefore, depends on whether ODNR's response to the TDN was inappropriate or lacked good cause. Upon reviewing this issue, Judge Torbett reasoned as follows:

Under the federal regulations, appropriate action "includes enforcement or other action under the state program to cause the violation to be corrected." 30 C.F.R. 842.11(b)(1)(ii)(B)(3). Good cause includes when "[u]nder the State program, the possible violation does not exist." 30 C.F.R. 842.11(b)(1)(ii)(B)(4)(i).

In determining whether ODNR's response was either inappropriate or lacking good cause, this tribunal must defer to the state's interpretation of its own good cause, this tribunal must defer to the state's interpretation of its own laws. ^{7/} For many years, the standard used by the Department in evaluating the state response was only whether the state action was "designed to secure abatement of the violation." 47 Fed. Reg. 35,627, 35,628 (August 16, 1982). While retaining this general standard, the Department has grown more permissive toward state responses in recent years. See Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989) (deciding whether OSMRE validly issued the NOV's requires evaluating DMLR'S determination under the Virginia State program). Because primacy states have the primary enforcement responsibility, "it is therefore the approved state program, rather than the Act, that will be used to determine whether a state action, taken in response to a federal 10 day notice, is appropriate or constitutes good cause." 53 Fed. Reg. 26,728, 26,732 (July 14, 1988) (citing Sen. Rep. 128, 95th Cong. 1st Sess. 92 (1977)).

^{7/} "Implementation of the goal of state primacy requires that OSMRE defer to a state's interpretation of its own regulations as along as that deference occurs within the framework of careful oversight." 53 Fed. Reg. 26,732 (July 14, 1988).

In this case, ODNR insists that leaving toxic forming materials untreated is not a violation of Ohio law in the first place as long as the revegetation standards have been met. This tribunal must defer to this interpretation "unless it determines that the state conclusion was arbitrary, capricious or an abuse

of discretion." 53 Fed. Reg. 26,728, 26,728 (July 14, 1988); see also, 30 C.F.R. § 842.11(b)(1)(ii)(B)(2). 8/ The Ohio regulation in controversy mandates that:

8/ 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) states that: "For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.

Any acid forming, toxic forming, combustible materials, or any other waste material exposed, used, or produced from a coal mining operation shall be:

- (a) Placed in such a manner so as to:
 - (i) Isolate said materials to minimize contact with water;
 - (ii) Prevent adverse effects on plant growth and land use.
- (c) Covered with four feet of nontoxic and noncombustible material or treated to a nontoxic and noncombustible state.

Ohio Administrative Code § 1501:13-9-14(J)(1), quoted in Respondent's Brief at p. 8.

Ohio's Conservation of Natural Resources Act, under which the above regulation was promulgated, establishes the general performance standards of the approved State program. Section 1513.16(A) of that statute provides in part that:

Any permit issued under this chapter to conduct coal mining operations shall require that the operations meet ALL applicable performance standards of this chapter AND such other requirements as the chief of the division of reclamation shall, by rule, adopt. General performance standards shall apply to all coal mining and reclamation operations and shall require the operator at a MINIMUM to do ALL of the following (emphasis added):

(2) Restore the land affected to a condition capable of supporting the uses that it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood so long as the uses do not present any actual or probable hazard to public health . . .

(10) Minimizing the disturbance to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality of water in surface

and groundwater systems both during and after coal mining operations and during reclamation. . . .

(14) Ensure that all debris, acid-forming materials, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and that the contingency plans are developed to prevent sustained combustion; and

(18) Establish on the regraded areas and all other lands affected, a diverse, effective, and permanent vegetative core of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area, except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan.

Ohio Stat. Ann. § 1513.16(A)(2), (10), (14) and (18) (1990).

ODNR's 'either-or' approach to interpreting the state program standards is blatantly contrary to the Ohio statute, which clearly requires Applicant, at a minimum, to treat toxic material in addition to reestablishing vegetation. Although ODNR's decision is evaluated under Ohio law, it should be noted that "[t]he State program must be 'no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act' and be 'no less effective than the Secretary's regulations in meeting the requirements of the Act.'"

[53] Fed. Reg. 26,728, 26,737 (July 14, 1991) (quoting 30 C.F.R. §§ 730.5 and 732.15(a)). The pertinent federal regulations, 30 C.F.R. §§ 816.41(f), 816.102(f) and 816.111, impose independent standards for treating toxic materials and for revegetation. In recognition of the fact that "[f]ederal standards imposed by the Act are thus enforced through the state program," the Ohio program standards must be independent of one another like their federal counterparts. Despite the standard of deferring to a state regulatory authority's interpretation, "this rule is not intended to eliminate enforcement obligations which exist under any state program." 53 Fed. Reg. at 26,735. ODNR's interpretation of Ohio law disregards its clear obligation to enforce the revegetation and toxic-treatment standards as mutually exclusive.

(Decision at 10-12.)

Contending error in Judge Torbett's Decision, Central Ohio argues that the response by ODNR was not arbitrary, capricious, or an abuse of discretion when construing the State program. It asserts that ODNR

appropriately "recognized that the two state standards in question overlap and can be met by examining revegetation success," (SOR at 11), and that Judge Torbett should not have substituted his own interpretation of the Ohio program. Appellant further argues that under ODNR's own construction of its program, a violation of the State program does not exist. Therefore, Central Ohio asserts, ODNR's response demonstrated good cause for not pursuing further action.

We cannot agree with Appellant. Scrutiny of the State program leads to the conclusion reached by Judge Torbett, the existence of a clear obligation to enforce the revegetation and toxic-treatment standards as mutually exclusive. We find that Judge Torbett's analysis above is a proper and an accurate summary of the principles prevailing in this case. His careful analysis demonstrates that the only reasonable interpretation of the Ohio law at issue, especially when construed with SMCRA, results in the conclusion reached in the appealed Decision. Appellant has not introduced any evidence or argument which would establish that the Decision was in error.

When, in response to a TDN, the State agency refused to take action because it did not consider the activity at issue to be in violation of the State program, and the interpretation of the statute advanced by the State agency was contrary to both the intent of SMCRA and a reasonable interpretation of State law, it was proper for OSM to construe the State of Ohio's response as inappropriate and to proceed with a Federal inspection.

See Paul F. Kuhn, 120 IBLA 1, 31, 98 Interior Dec. 231, 247 (1991).

As stipulated by Appellant, the toxic content in the soil met the definition of toxic-forming materials under Ohio law. (Stipulation No. 7.)

Thus, the resulting inspection and NOV became the only proper course of action for OSM to pursue in light of ODNR's response. Under the regulations, ODNR's response was not "appropriate action" because the violation was not abated, nor did the response constitute good cause inasmuch as the violation did exist under a reasonable and proper interpretation of the State program. Accordingly, the NOV must be sustained.

[3] Finally, we address Appellant's claim that this Board has no authority to review the subject matter of this appeal. Central Ohio bases this argument on an assertion that the statutes and regulations involved here, 30 U.S.C. § 1255 (1994) and 43 C.F.R. §§ 4.1160 and 4.1180, while providing a review process for NOV's and CO's issued under the authority of sections 521(a)(2) and (a)(3), do not provide for such review of actions under section 521(a)(1).

The OSM was bound by section 521(a)(1) to oversee enforcement of the State program. When ODNR failed to take action to enforce the State program following receipt of the TDN, OSM was obliged to issue the NOV. See Consolidation Coal Co., 127 IBLA at 194. In conjunction with OSM's authority to issue the NOV under 43 C.F.R. § 843.12(a)(2), the Department has provided in 43 C.F.R. § 843.16 that an aggrieved party may apply for

review of OSM's action, as well as request a hearing in the matter, under 43 C.F.R. Part 4. However, the procedural regulations found in 43 C.F.R. Part 4, Subpart L (Special Rules Applicable to Surface Coal Mining Hearings and Appeals), do not specifically speak to NOV's issued pursuant to section 843.12(a)(2). Cf. 30 C.F.R. §§ 4.1160, 4.1180. However, if there is a "gap" in the procedural regulations with respect to this matter, ^{4/} it will not work to frustrate the jurisdiction of this Board. The Secretary has delegated authority to this Board to "decide finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to: (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977." 43 C.F.R. § 4.1(b)(3); see also, 43 C.F.R. § 4.1101(a). An Administrative Law Judge is a Departmental official rendering decisions relating to surface mining. We find no merit in Appellant's challenge to jurisdiction.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

^{4/} The OSM argues that there is no gap in enforcement inasmuch as the authority for § 843.12(a)(2) may be found in § 521(a)(3). This argument was not addressed herein as the Board finds its discussion infra to be Sufficient.

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